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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1940

## No. 740

JULIA C. GELFERT, AS SOLE SURVIVING EXECUTOR OF THE LAST WILL AND TESTAMENT OF JAMES J. CARPENTER, DECEASED, PETITIONER,

*vs.*

NATIONAL CITY BANK OF NEW YORK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED FEBRUARY 1, 1941.

CERTIORARI GRANTED MARCH 3, 1941.

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*vs.*

THE NATIONAL CITY BANK OF NEW YORK

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 13, 1941.

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[fol. 1]

## IN COURT OF APPEALS OF NEW YORK

THE NATIONAL CITY BANK OF NEW YORK, Plaintiff-Appellant,

against

JULIA C. GELFERT, as Executor under the Last Will and Testament of James J. Carpenter, Deceased, Marie V. Carpenter, Dorothy R. Carpenter, Vivian D. Carpenter, Morris Ances, Doing Business as Morris Auto Supplies, Mary Carpenter, Michaels Bros., Abraham & Straus, Inc., The People of the State of New York and The United States of America, Defendants,

GEORGE U. HAMMOND, as Executor under the Last Will and Testament of James J. Carpenter, Defendant-Respondent

### STATEMENT UNDER RULE 234

This action was commenced by the service of the summons and complaint on respondent on May 17th, 1938.

Respondent appeared herein by his attorneys on June 6th, 1938; said attorneys demanded service of all papers herein on them, but the respondent did not interpose an answer to the complaint.

The name of the original plaintiff is The National City Bank of New York.

The name of the original defendant-respondent is George U. Hammond, as Executor under the Last Will and Testament of James J. Carpenter, deceased.

[fol. 2] Plaintiff's attorneys are Zalkin & Cohen, Esqs.

Defendant-respondent's attorneys are McKercher & Link.

There has been no change of parties or attorneys herein.

Judgment was rendered in favor of the plaintiff and against the defendants Julia C. Gelfert and George U. Hammond, as executors under the Last Will and Testament of James J. Carpenter, Deceased, in the sum of $16,162.12, which judgment was entered in the office of the Clerk of the County of Kings on February 4, 1939, and was entered pursuant to an order of Mr. Justice May, dated February 2, 1939. The said order of Mr. Justice May granted the plaintiff's motion to confirm the report of the Referee to sell and to direct the entry of a deficiency judgment against the aforementioned defendants in the said sum of $16,162.12,

and denied the cross-motion of the defendant George U. Hammond, as executor, etc., for an order fixing the value of the foreclosed premises for the purpose of deficiency judgment proceedings.

An appeal was taken by the defendant George U. Hammond, as executor under the Last Will and Testament of James J. Carpenter, Deceased, to the Appellate Division, Second Department. The said appeal resulted in an order modifying the order of Mr. Justice May, dated February 2, 1939, by striking therefrom all of its directory provisions, except the denial of defendant's cross-motion and that part thereof which ratified and confirmed the Referee's report of sale, omitting therefrom the reference to a deficiency, and affirming the order as so modified and vacating the judgment entered February 4, 1939 pursuant to the said order. The judgment was vacated on September 1, 1939 [fol. 3] when the order of the Appellate Division and the remittitur were filed in the office of the Clerk of the County of Kings. The plaintiff appeals from the judgment entered September 1, 1939, vacating the prior judgment and appeals from the aforesaid order of the Appellate Division. The notice of appeal was served and filed on September 5, 1939.

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In Supreme Court of New York, Kings County

6996/1938

The National City Bank of New York, Plaintiff,

against

Julia C. Gelfert and George U. Hammond, as Executors under the Last Will and Testament of James J. Carpenter, Deceased, Marie V. Carpenter, Dorothy R. Carpenter, Vivian D. Carpenter, Morris Ances, Doing Business as Morris Auto Supplies, Mary Carpenter, Michaels Bros., Abraham & Straus, Inc., The People of the State of New York and The United States of America, Defendants

Notice of Appeal to Appellate Division

Sirs:

Please take notice that the above named George U. Ham- [fol. 4] mond, as one of the Executors of the Last Will and Testament of James J. Carpenter, deceased, hereby appeals

to the Supreme Court, Appellate Division, Second Department, from the order made in the above entitled action and entered in the office of the Clerk of the County of Kings on the second day of February, 1939, confirming the referee's report of sale, dated December 22nd, 1938, denying the said defendant's cross-motion, and directing that a deficiency judgment in the sum of $16,162.12 be docketed, and this appeal is taken from the whole and from each and every part of said order and from each and every part of the judgment docketed pursuant to said order.

Dated, February 20, 1939.

Yours, etc., McKercher & Link, Attorneys for Defendant, George U. Hammond, as executor of the Last Will and Testament of James J. Carpenter, Deceased, 17 John Street, New York, New York.

To: Zalkin & Cohen, Esqs., Attorneys for Plaintiff, 19 Rector Street, New York, New York,

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[fol. 5] In Supreme Court of New York, Kings County

(Special Term—Part I)

Order Appealed From—February 2, 1939

A motion having been made by the plaintiff for an order overruling the exceptions filed by defendant George U. Hammond to the referee's report of sale herein, confirming said referee's report, and for a deficiency judgment for the amount of the deficiency reported by said referee with interest thereon from the date of said report; and the defendant George U. Hammond having made a cross-motion for an order fixing the real value of the premises foreclosed for the purpose of deficiency judgment proceedings; and said motion and cross-motion having duly come on to be heard;

Now, on reading the referee's report of sale, dated December 22, 1938 and heretofore filed herein, the exceptions of the defendant George U. Hammond, dated December 29, 1938 and heretofore filed herein, and upon reading and filing plaintiff's notice of motion dated January 11, 1939, the affidavit of Franklyn M. Stone, sworn to on January 11, 1939, and the exhibit thereto annexed, in support of said

motion, and proof of due service thereof, the notice of said [fol. 6] cross-motion dated January 20, 1939, the affidavit of George U. Hammond, sworn to on January 20, 1939 and the affidavit and the corrected affidavit of Donald J. Lyons, sworn to on January 19 and 20th, 1939, in support of said cross-motion, with proof of service thereof, the affidavits of Franklyn M. Stone and Harold M. Mills, both sworn to on January 24, 1939, in opposition to said cross-motion; and due deliberation having been had thereon, and upon filing the memorandum of the court dated January 31, 1939; and on motion of Zalkin & Cohen, Esqs., attorneys for plaintiff; it is

Ordered, that plaintiff's said motion be and the same hereby is granted in all respects and that the cross-motion of said defendant be and the same hereby is denied in all respects; and it is further

Ordered, that the report of sale made by David Senft, Referee, dated December 22, 1938, be and the same hereby is ratified and confirmed in all respects and the sale therein mentioned be and the same hereby is made absolute and binding forever, and the exceptions to said report taken by defendant George U. Hammond, dated December 29, 1938 are overruled; and it is further

Ordered, adjudged and decreed that the plaintiff, The National City Bank of New York (whose address is 55 Wall Street, in the Borough of Manhattan, City of New York) recover of the defendants Julia C. Gelfert and George U. Hammond, as Executors under the Last Will and Testament of James J. Carpenter, Deceased (the address of said Julia C. Gelfert being 825 East 13th Street, in the Borough [fol. 7] of Brooklyn, City of New York, and the address of said George U. Hammond being 129 Pearl Street, Borough of Manhattan, City of New York) the sum of $16,162.12, representing the deficiency reported by said referee, with interest thereon from December 22, 1938, the date of said referee's report, and the Clerk of this court is hereby directed to docket judgment therefor in favor of said plaintiff and against said defendants.

Enter.

Mitchell May, J. S. C.

Granted, Feb. 2, 1939.

John N. Harman, Clerk.

[fol. 8] JUDGMENT DOCKETED PURSUANT TO SAID ORDER

No. 10412

| Names of Parties against whom Judgments have been obtained | Names of Parties in whose favor Judgments have been obtained |
|---|---|
| Julia C. Gelfert, 825 East 13th St., Bklyn. | |
| George U. Hammond 129 Pearl St., N. Y. C. as Executors of the Estate of James J. Carpenter | National City Bank of New York |

| Attorney's Name | Time of Filing | H.M. | Damages and Costs Deficiency |
|---|---|---|---|
| Zalkin & Cohen | Feb. 4 1939 | 10:20 | $16,162.12 Interest from Dec. 22, 1938 |

COUNTY CLERK'S OFFICE,
Kings County, Apr. 21, 1939, ss:

I, John N. Harman, Clerk of the County of Kings, do hereby Certify the foregoing is a correct transcript from the Docket of Judgments kept in my office, of a Judgment rendered in the Supreme Court for said County.

John N. Harman, Clerk.

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[fol. 9] IN SUPREME COURT OF NEW YORK

PLAINTIFF'S MOTION TO CONFIRM REFEREE'S REPORT OF SALE

SIRS:

Please take notice that upon the annexed affidavit of Franklyn M. Stone, sworn to the 11th day of January, 1939, and upon the report of David Senft, Referee, dated and verified the 22nd day of December, 1938 and filed in the office of the Clerk of the County of Kings on the 24th day of December, 1938, and the exceptions to said report taken in behalf of the defendant George U. Hammond, and upon the judgment of foreclosure and sale herein, and the papers

and proceedings had herein, the undersigned will move at Special Term, Part I of the Supreme Court, Kings County, appointed to be held in the County Courthouse, Court and Joralemon Streets, Borough of Brooklyn, City and State of New York, on the 23rd day of January, 1939, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order overruling the aforesaid exceptions, confirming the said Referee's report and making absolute and binding forever the sale therein mentioned, and adjudging that plaintiff recover of the defendants Julia C. Gelfert and George U. Hammond, as Executors under the Last Will and Testament of James J. Carpenter, Deceased, the sum of $16,162.12 representing the deficiency reported by said Referee with interest thereon from the 22nd day of December, 1938 and for such other and further relief as [fol. 10] may be just, equitable and proper.

Dated, New York, January 11, 1939.

Yours, etc., Zalkin & Cohen, Attorneys for Plaintiff, Office & P. O. Address, 19 Rector Street, Borough of Manhattan, City of New York.

To:

McDermott & Turner, Attorneys for defendant, Julia C. Gelfert, etc., 165 Broadway, N. Y. C.

McKercher & Link, Attorneys for Defendant, George U. Hammond, etc., 17 John Street, N. Y. C.

John J. Bennett, Jr., Attorney for Defendant, The People of the State of New York, The Capitol, Albany, New York.

Jacob Wittner, Esq., Guardian ad litem for Defendant, Vivian D. Carpenter, 545 Fifth Avenue, New York, N. Y.

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[fol. 11] IN SUPREME COURT OF NEW YORK

AFFIDAVIT OF FRANKLYN M. STONE, IN SUPPORT OF MOTION TO CONFIRM REFEREE'S REPORT OF SALE

CITY, COUNTY AND STATE OF NEW YORK, ss:

Franklin M. Stone, being duly sworn, deposes and says:

That he is an attorney at law associated with the attorneys for the plaintiff in this action and has had charge of and is familiar with the proceedings had herein.

Pursuant to the judgment of foreclosure and sale, dated the 15th day of November, 1938 and filed herein on said date, the mortgaged premises were duly sold by David Senft, Esq., the Referee appointed by said judgment to make the sale, and the proceeds of the sale were disposed of pursuant to said judgment as appears by said Referee's report of sale, dated and verified the 22nd day of December, 1938, and filed herein on the 24th day of December, 1938.

That notice of the filing of said Referee's report was duly served upon the attorneys for the defendants entitled to notice thereof and upon the Guardian ad litem for the infant defendant Vivian D. Carpenter, as appears by the original of said notice hereto annexed and made a part hereof, and by the affidavit of Goldie Press, sworn to the 24th day of December, 1938, showing service of said notice on said attorneys and said Guardian ad litem, which affidavit of service is hereto annexed and made a part hereof.

That more than eight days have elapsed since said Referee's report was filed and that no exceptions to said re-
[fol. 12] port have been taken, excepting in behalf of defendant George U. Hammond. Annexed hereto and made a part hereof is a certificate of the Clerk of the County of Kings, dated January 10, 1939, certifying that no exceptions were filed to said report. Nevertheless, there was served upon the attorneys for the plaintiff exceptions to said report taken in behalf of defendant George U. Hammond, which exceptions bear date the 29th day of December, 1938, and to which reference will be further made herein. That the time for filing exceptions to said Referee's report has expired.

That the exceptions filed in behalf of defendant George U. Hammond are (1) that the price at which the property was sold herein was wholly inadequate, unconscionable and inequitable, (2) that the sale price is so low as not to be a sale within the meaning of the Civil Practice Act, (3) that no deficiency judgment should be permitted to be entered herein.

That said exceptions are insufficient in law and should be overruled for the following reasons: The mortgage foreclosed in this action was executed and delivered on December 29, 1932, and neither the provisions of Section 1083-a of the Civil Practice Act nor the amendment to Section 1083 of said Act (in effect on April 7, 1938) are applicable to this action and the court does not, therefore, possess

statutory power to inquire into the value of the mortgaged premises at the time of the sale and limit or deny a judgment for the deficiency reported by the Referee; that the judgment of foreclosure and sale entered herein on November 15, 1938, which provides that plaintiff may apply at the foot of said judgment for judgment against defendants Julia C. Gelfert and George U. Hammond, as Executors under the [fol. 13] Last Will and Testament of James J. Carpenter, Deceased (the mortgagor) for such deficiency as the plaintiff may be entitled to, is final as to the deficiency reported by said Referee and inasmuch as said judgment has not been vacated, this court is not authorized or empowered to revise said final judgment by sustaining any of the aforesaid exceptions and limiting or denying a judgment for the deficiency reported by said Referee; and that said exceptions are not based upon any alleged fraud or inequitable or improper conduct on plaintiff's part in reference to the sale had herein and the court is, therefore, not authorized or empowered to deny a deficiency judgment or order a resale even if it be assumed, although it is not admitted that the price at which the property sold herein is less than the market value of the property on the date of the sale.

As a matter of fact, deponent has been informed by a real estate expert employed by The National City Realty Company that the fair and reasonable value of the mortgaged property at the time the same was sold herein was $6,000. Inasmuch as the property was sold herein for the sum of $4,000, there having been no other bidders at the sale, the amount so paid for the property upon the sale cannot under any circumstances be deemed to be unconscionable.

Deponent therefore requests that an order be made herein overruling said exceptions, confirming in all respects said Referee's report of sale and making absolute and binding forever the sale therein mentioned, and adjudging that the plaintiff recover of the defendants Julia C. Gelfert and George U. Hammond, as Executors under the Last Will and Testament of James J. Carpenter, Deceased, the sum of [fol. 14] $16,162.12, being the deficiency reported by said Referee, with interest thereon from December 22, 1938, the date of said Referee's report, and directing that the Clerk of this court docket judgment therefor.

Franklyn M. Stone.

(Sworn to January 11, 1939.)

CERTIFICATE OF THE CLERK OF THE COUNTY OF KINGS, DATED JANUARY 10, 1939, ANNEXED TO FOREGOING AFFIDAVIT

Kings County Clerk's Office

Brooklyn

No. 2912

Vol. 526, Page 219, File No. 6996, Year 1938

[Same Title]

CITY AND STATE OF NEW YORK,
County of Kings, ss:

I, John N. Harman, Clerk of the County of Kings, do hereby certify that I have carefully examined the records of my office from the 24th day of December, 1938, to date, for any exceptions to Referee's Report of Sale and fail to find the same on file therein.

Witness, my hand and Official Seal, this 10th day of Jan., 1939.

John N. Harman, County Clerk of Kings County.
(Seal)

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[fol. 15] NOTICE OF FILING REFEREE'S REPORT, ANNEXED TO FOREGOING AFFIDAVIT

SIRS:

Please take notice that the report of David Senft, Esq., the Referee appointed by the judgment in this action to sell the mortgaged premises, was duly filed in the office of the Clerk of the County of Kings on the 24th day of December, 1938.

Dated, New York, December 24, 1938

Yours, etc., Zalkin & Cohen, Attorneys for Plaintiff, Office & P. O. Address, 19 Rector Street, Borough of Manhattan, City of New York.

To:

McDermott & Turner, Attorneys for Defendant, Julia C. Gelfert, etc., 165 Broadway, N. Y. C.

McKercher & Link, Attorneys for Defendant, George U. Hammond, etc., 17 John St., N. Y. C.

John J. Bennett, Jr., Attorney for Defendant, The People of the State of New York, The Capitol, Albany, N. Y.

Jacob Wittner, Esq., Guardian ad litem for Defendant, Vivian D. Carpenter, 545 Fifth Avenue, N. Y. C.

[fol. 16] AFFIDAVIT OF GOLDIE PRESS, ANNEXED TO FOREGOING AFFIDAVIT

STATE OF NEW YORK,
County of New York, ss:

Goldie Press, being duly sworn, deposes and says:

That she is a clerk in the employ of Zalkin & Cohen, attorneys for the plaintiff in the above entitled action and is over the age of eighteen years.

That on the 24th day of December, 1938, she served the annexed notice of filing of the Referee's Report of Sale upon the attorneys for defendants in this action and upon the Guardian ad litem for the defendant, Vivian D. Carpenter, whose names are hereinafter set forth, by depositing true copies of said notice in a post office box regularly maintained by the United States Post Office at 19 Rector Street, Borough of Manhattan, City of New York, and that the same were properly enclosed in post-paid wrappers addressed as follows:

McDermott & Turner, Esqs., 165 Broadway, New York, N. Y.

McKercher & Link, Esqs., 17 John Street, New York, N. Y.

John J. Bennett, Jr., The Capitol, Albany, New York.

Jacob Wittner, Esq., 545 Fifth Avenue, New York, N. Y.

those being the office addresses designated by said attorneys and by said Guardian ad litem in the last papers served by them.

Goldie Press

(Sworn to December 24, 1938)

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[fol. 17] IN SUPREME COURT OF NEW YORK

REFEREE'S REPORT OF SALE

To the Honorable the Supreme Court of the State of New York:

I, David Senft, the Referee appointed by the judgment of this court dated and entered herein the 15th day of November, 1938, to make the sale of the mortgaged lands and premises therein particularly described and directed to be sold, do respectfully report as follows:

1. I caused due notice of the sale of said lands and premises by me at public auction held on the 16th day of December, 1938, at twelve o'clock noon at the Brooklyn Real Estate Exchange located at 189 Montague Street, in the Borough of Brooklyn, County of Kings, City and State of New York, to be given and published according to law and the rules of practice of this court and containing a description of the property to be sold conforming in all respects with the description set forth in said judgment, as more fully appears by the annexed affidavit of Goldie Press, sworn to the 30th day of November, 1938, showing due service of a printed notice of such sale upon the attorneys for the defendants who were entitled to notice thereof and upon the Guardian ad litem for Vivian D. Carpenter, the infant defendant herein, and by the annexed affidavit of Hubert Davies, sworn to the 21st day of December, 1938, and the annexed affidavit of C. J. Marquart, sworn to the 16th day of December, 1938, showing the due publication of a copy of such notice of sale at least twice a week in each of [fol. 18] the three successive weeks immediately preceding the sale in the Brooklyn Daily Eagle and in the Brooklyn Citizen, being newspapers published daily in the Borough of Brooklyn, County of Kings, City and State of New York, where the mortgaged lands and premises are situated.

2. That at the time and place for which said sale was noticed as aforesaid, I attended in person, and, agreeably to such notice, offered the said lands and premises for sale to the highest bidder by Thomas F. Layden, Auctioneer, upon the terms of sale hereto annexed and publicly read said notice of sale and said terms of sale previous to the bidding, and that the said mortgaged lands and premises were then and there struck off and sold to Matin Realty, Inc., for the sum of Four Thousand and 00/100 ($4,000) Dollars, that being the highest sum bid therefor, the said Matin Realty, Inc., being the nominee of the plaintiff, as appears by the certificate of plaintiff's attorneys annexed hereto; and that payment of ten (10%) per cent of that sum and all taxes, assessments, water rates and interest and penalties thereon were waived by plaintiff's attorneys in writing, as appears by such waiver hereto annexed.

3. Plaintiff being the purchaser of the mortgaged lands and premises, by its said nominee, I did not require payment of the amount so bid but received from the plaintiff on

account of such purchase money the sum of One Hundred and 00/100 ($100.00) Dollars for my services; I allowed to and credited plaintiff with the following amounts: Three Hundred and Ten and 40/100 ($310.40) Dollars representing costs and disbursements taxed as per bill of costs ex-
[fol. 19] hibited to me; the sum of Two Hundred and 00/100 ($200.00) Dollars representing the additional allowance awarded to plaintiff by the judgment of foreclosure and sale; the sum of One Hundred Thirty-six and 10/100 ($136.10) Dollars representing the cost of advertising said notice of sale; the sum of Five and 00/100 ($5.00) Dollars representing the fee of the Brooklyn Real Estate Exchange; the sum of Twenty-five and 00/100 ($25.00) Dollars representing the fee of the auctioneer; and the sum of Four and 00/100 ($4.00) Dollars representing documentary stamp tax upon the Referee's deed; and annexed hereto are receipts for the aforesaid sums so allowed and credited by me. Pursuant to the judgment herein, which provides that the purchaser shall be credited on account of the purchase price with the amount of taxes, assessments and water rates with interest and penalties thereon, upon waiver of the payment thereof in writing, and payment thereof having been waived as per written waiver hereto annexed, I also allowed to and credited the plaintiff with the sum of Eight Hundred Sixty-seven and 15/100 ($867.15) Dollars representing unpaid taxes and water rates, proof thereof having been exhibited to me.

4. I have made, executed and delivered to said Matin Realty, Inc., the nominee of the plaintiff and the purchaser upon the aforesaid sale, a good and sufficient deed of conveyance of the mortgaged lands and premises containing the description set forth in the judgment.

5. I have credited the plaintiff with the sum of Two Thousand Three Hundred Fifty-two and 35/100 ($2,352.35) Dollars, being the balance of the purchase price.

[fol. 20] 6. There remains, therefore, a deficiency in the sum of Sixteen Thousand One Hundred Sixty-two and 12/100 ($16,162.12) Dollars with interest thereon from the date of this report.

7. Said premises were sold, and the aforesaid deed executed by me conveyed the premises subject to easements, if any, covenants and restrictions, if any, contained in any

prior recorded instruments, building restrictions and regulations contained in resolution or ordinance adopted by the Board of Estimate and Apportionment of the City of New York on July 25, 1916, and amendments and additions thereto now in force, and also subject to any state of facts which an accurate survey may show, and also subject to unpaid taxes, assessments and water rates with interest and penalties thereon.

8. Annexed hereto and made a part of this report is a statement showing the several items aforesaid and the mode of computation of said deficiency.

All of which is respectfully submitted.

Dated, December 22, 1938.

David Senft, Referee.

[fol. 21] ADVERTISEMENT OF SALE

The premises described in the annexed advertisement of sale will be sold under the direction of the undersigned Referee upon the following terms:

1. Ten (10%) per cent of the purchase money will be required to be paid to the said Referee at the time and place of the sale and for which the Referee's receipt will be given; and in case the plaintiff or any nominee of the plaintiff shall become the purchaser at the sale, they shall not be required to make the aforesaid payment.

2. The residue of the purchase money will be required to be paid to David Senft, Esq., said Referee, at his office located at No. 26 Court Street, Borough of Brooklyn, County of Kings, City and State of New York, on the 23rd day of December, 1938 at 2 o'clock in the afternoon of that day, when said Referee's deed will be ready for delivery.

3. The Referee is not required to send any notice to the purchaser or purchasers, and if the purchaser or purchasers neglect to call at the time and place above specified to receive his or their deed, he or they will be charged with interest thereafter on the whole amount of the purchase unless the Referee shall deem it proper to extend the time for the completion of said purchase.

4. All taxes, assessments and water rates, with interest and penalties thereon, which at the time of the sale are liens

[fol. 22] or encumbrances upon said premises, will be allowed by the Referee out of the purchase money, provided the purchaser or purchasers shall, previous to the delivery of the deed, produce to the Referee proof of such liens and duplicate receipts for the payment thereof, unless the plaintiff or its attorneys shall waive the payment thereof in writing, in which event the Referee will convey the mortgaged premises subject to the lien thereof and the purchaser or purchasers shall be credited with the amount of such taxes, assessments and water rates, and interest and penalties thereon, on account of the purchase price.

5. The purchaser of said premises will, at the time and place of sale, sign a memorandum of his purchase, and an agreement to comply with the terms and conditions of sale herein contained, and pay, in addition to the purchase money, the auctioneer's fee of $ —.

6. The bidding will be kept open after the property is struck down and in case the purchaser shall fail to comply with any of the above conditions of sale, the premises so struck down will be again put up for sale under the direction of said Referee and under the terms of sale, without application to the Court, unless plaintiff's attorneys shall elect to make such application, and such purchaser will be held liable for any deficiency there may be between the sum for which said premises shall be struck down upon the sale and that for which they may be purchased under resale, and also for any costs and expenses occurring on such resale.

7. The premises will be sold, as set forth in the notice of sale, subject to easements, if any, covenants and restric-[fol. 23] tions, if any, contained in any prior recorded instruments, building restrictions and regulations contained in resolution or ordinance adopted by the Board of Estimate and Apportionment of the City of New York on July 25, 1916, and amendments and additions thereto now in force, and also subject to any state of facts which an accurate survey may show.

Dated, December 16th, 1938.

David Senft, Referee.

MEMORANDUM OF SALE

The undersigned has this 16th day of December, 1938, purchased the premises described in the above annexed

printed advertisement of sale, for the sum of $ — and hereby promises and agrees to comply with the terms and conditions of the sale of said premises as above mentioned and set forth.

Dated, December 16th, 1938.

Matin Realty Inc., Per F. M. Stone, Purchaser, 55 Wall Street, New York City, N. Y.

Payment of ten (10%) per cent of the purchase money, at the time and place of sale, is hereby waived.

[fol. 24] Payment of taxes, assessments and water rates, and interest and penalties thereon, is hereby waived.

Dated, December 16, 1938.

Zalkin & Cohen, Attorneys for Plaintiff. David Senft, Referee.

We hereby certify that Matin Realty, Inc., the purchaser at the foreclosure sale held this day, is the nominee of The National City Bank of New York, the plaintiff in this action.

Dated, December 16, 1938.

Zalkin & Cohen, Attorneys for Plaintiff.

Allowance and credit to plaintiff of the following sums is hereby acknowledged:

| | |
|---|---|
| Plaintiff's costs and disbursements as taxed | $310.40 |
| Additional allowance awarded to plaintiff | 200.00 |

Dated, December 22, 1938.

Zalkin & Cohen, Attorneys for Plaintiff.

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[fol. 25] AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
County of New York, ss:

GOLDIE PRESS, being duly sworn, deposes and says, that she is a clerk in the employ of Zalkin & Cohen, the attorneys for the plaintiff in the above entitled action and is over the age of eighteen years.

That on the 30th day of November, 1938, she served the annexed Notice of Sale upon the attorneys for defendants in this action and upon the Guardian ad Litem for defend-

ant Vivian D. Carpenter, whose names are hereinafter set forth, by depositing true copies of such Notice of Sale in a post office box regularly maintained by the United States Post Office at 19 Rector Street, Borough of Manhattan, City of New York, and that the same were properly enclosed in post-paid wrappers addressed as follows:

McDermott & Turner, 165 Broadway, New York, N. Y.
McKercher & Link, 17 John Street, New York, N. Y.
Jacob Wittner, 545 Fifth Avenue, New York, N. Y.
Conroy & Hardy, 32 Court Street, Brooklyn, New York.
Otto A. Samuels, 300 Madison Avenue, New York, N. Y.
John J. Bennett, Jr., The Capitol, Albany, New York.

those being the office addresses designated by said attorneys and by said Guardian ad Litem in the last papers served by them.

Goldie Press.

(Sworn to November 30, 1938.)

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[fol. 26] NOTICE OF SALE

SIRS:

Please take notice that annexed hereto is a true copy of the Notice of Sale of the mortgaged premises herein, pursuant to the judgment of foreclosure and sale made and entered herein.

Dated, New York, November 26, 1938.

Yours, etc., Zalkin & Cohen, Attorneys for Plaintiff, Office and P. O. Address, 19 Rector Street, New York City.

To:

McDermott & Turner, Attorneys for Julia C. Gelfert.
McKercher & Link, Attorneys for George U. Hammond.
Jacob Wittner, Guardian ad Litem.
Conroy & Hardy, Attorneys for Abraham & Straus, Inc.
Otto A. Samuels, Attorney for Michaels Bros.
John J. Bennett, Jr., Attorney for People of the State of New York.

[fol. 27] SUPREME COURT, KINGS COUNTY

The National City Bank, of New York, plaintiff against Julia C. Gelfert, et al., defendants.

Pursuant to a judgment herein, dated November 15, 1938, I will sell at public auction to the highest bidder, by Thomas F. Layden, auctioneer, at the Brooklyn Real Estate Exchange, located at 189 Montague Street, in the Borough of Brooklyn, County of Kings, City and State of New York, on the 16th day of December, 1938, at 12 o'clock noon, the mortgages premises located in the Borough of Brooklyn, City of New York, directed by said judgment to be sold, with the improvements thereon, described as follows:

All the certain lot, piece or parcel of land, situate, lying and being in the Borough of Brooklyn, County of Kings, State of New York, bounded and described as follows:

Beginning at a point on the corner formed by the intersection of the northerly side of 38th Street with the easterly side of 4th Avenue; running thence northerly along the easterly side of 4th Avenue, 25 feet, 2 inches; thence easterly parallel with 38th Street, 100 feet; thence southerly parallel with 4th Avenue, 25 feet, 2 inches to the northerly side of 38th Street and thence westerly along the northerly side of 38th Street, 100 feet, to the point or place of beginning.

Together with all the right, title and interest, if any, of the parties hereto of the first part, in and to the land of 38th Street and 4th Avenue, to the centre thereof, in front of and adjoining said premises.

Subject to easements, if any, covenants and restrictions, if any, contained in any prior recorded instruments, building restrictions and regulations contained in resolution or [fol. 28] ordinance adopted by the Board of Estimate and Apportionment of the City of New York on July 25, 1916, and amendments and additions thereto now in force, and also subject to any state of facts which an accurate survey may show.—Dated November 23rd, 1938.

David Senft, Referee.

Zalkin & Cohen, Attorneys for Plaintiff, 19 Rector Street, New York, N. Y.

STATEMENT

| | | | |
|---|---|---|---|
| Amount due upon obligation and mortgage, as per judgment | | | $18,401.25 |
| Interest thereon from November 15, 1938 to December 22, 1938, date of closing | | | 113.22 |
| | | | $18,514.47 |
| Amount of Purchase Money | | $4,000.00 | |
| Deductions, allowances and credits: | | | |
| Referee's fees | $100.00 | | |
| Taxed costs | 310.40 | | |
| Extra allowance | 200.00 | | |
| Advertising sale | 136.10 | | |
| Exchange fee | 5.00 | | |
| Auctioneer's fee | 25.00 | | |
| Stamp tax on deed | 4.00 | | |
| Unpaid taxes and water rates | 867.15 | 1,647.65 | |
| | | | 2,352.35 |
| Deficiency | | | $16,162.12 |

Dated, December 22, 1938.

David Senft, Referee.

(Verified December 22, 1938.)

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[fol. 29] IN SUPREME COURT OF NEW YORK

EXCEPTIONS TO REFEREE'S REPORT OF SALE

SIRS:

Please take notice that the defendant, George U. Hammond, as one of the executors of the Last Will and Testament of James J. Carpenter, hereby excepts to the report of sale filed herein by David Senft, Esq., the referee appointed by this Court to sell the premises described in the complaint in the above entitled action in the following particulars:

1. That the price at which said property was sold was wholly inadequate, unconscionable and inequitable.

2. That the sale price is so low as not to be a sale within the meaning of the Civil Practice Act.

3. That no deficiency judgment should be permitted to be entered herein.

Dated, New York, December 29, 1938.

Yours, etc., McKercher & Link, Attorneys for George U. Hammond as one of the Executors of the Last Will and Testament of James J. Carpenter, deceased, 17 John Street, New York, New York.

To: Zalkin & Cohen, Esqs., Attorneys for Plaintiff, 19 Rector Street, New York, New York.

[fol. 30] McDermott & Turner, Esqs., Attorneys for Defendant, Julia C. Gelfert, etc., 165 Broadway, New York, New York.

John J. Bennett, Jr., Esq., Attorney for Defendant, People of the State of New York, The Capitol, Albany, New York.

Jacob Wittner, Esq., Guardian Ad Litem for Defendant, Vivian D. Carpenter, 545 Fifth Avenue, New York, New York.

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IN SUPREME COURT OF NEW YORK

DEFENDANT'S CROSS-MOTION

SIRS:

Please take notice that upon the annexed affidavit of George U. Hammond, sworn to the 20th day of January, 1939, and the affidavit of Donald J. Lyons, sworn to the 19th day of January, 1939, and upon all of the proceedings heretofore had herein, the undersigned will move this court at a Special Term, Part I thereof, to be held at the County Courthouse, Borough of Brooklyn, City of New York, on the 23rd day of January, 1939, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, by way of cross-motion, for an order fixing the real [fol. 31] value of the premises foreclosed for the purposes of deficiency judgment proceedings upon the ground that it would be inequitable and unconscionable to permit the plaintiff herein to enter a deficiency judgment as demanded in the notice of motion dated January 11th, 1939, upon the ground that the sale price was wholly inequitable and ur-

conscionable and for such other and further relief as to the court may seem just and proper.

Dated, January 20th, 1939.

McKercher & Link, Attorneys for Defendant, George U. Hammond as Executor, etc., 17 John Street, New York, New York.

To:

Zalkin & Cohen, Esqs., Attorneys for Plaintiff, 19 Rector Street, New York, New York.

McDermott & Turner, Esqs., Attorneys for Defendant, Julia C. Gelfert as Executrix, etc., 165 Broadway, New York, New York.

Jacob Wittner, Esq., Guardian ad litem for Defendant, Vivian D. Carpenter, 545 Fifth Avenue, New York, New York.

John J. Bennett, Jr., Esq., Attorney for Defendant, The People of the State of New York, The Capitol, Albany, New York.

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[fol. 32] AFFIDAVIT OF GEORGE U. HAMMOND, IN OPPOSITION TO MOTION TO CONFIRM REFEREE'S REPORT OF SALE AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

STATE OF NEW YORK,
County of New York, ss:

George U. Hammond, being duly sworn says that he is one of the executors of the estate of James J. Carpenter, deceased, and is one of the defendants named herein and he makes this affidavit in opposition to the plaintiff's motion dated January 11th, 1939, and also in support of your deponent's cross-motion for the relief demanded in the annexed notice of motion.

This action was brought to foreclose a mortgage upon the property described in the complaint which mortgage was given as collateral security under a written agreement dated April 19th, 1928, which guarantee was signed by James J. Carpenter, who was the owner of said premises.

Simultaneously with the execution of the mortgage by Mr. Carpenter, there was delivered to the plaintiff herein by George U. Hammond, individually, a mortgage covering certain premises located in Orange County, New York. The Orange County property has been foreclosed and at the

present time there is pending before Mr. Justice Aldrich an application similar to the present application for a deficiency judgment. Mr. Justice Aldrich has handed down a decision referring the matter to a former justice of the Appellate Division, Mr. Justice Seeger, official referee, to take testimony and report with respect to (1) the fair and [fol. 33] reasonable market value at the date of the sale so that the court may determine whether the sale as made is unconscionable, and (2) whether the existing facts and circumstances are such that the premises should be sold subject to an inchoate right of dower, if any.

The amount claimed to be due the plaintiff herein as shown in the referee's report of computation is based upon monies due the plaintiff from a corporation then known as Hammond & Carpenter Corporation. The decedent, James J. Carpenter, and George U. Hammond, had personally guaranteed all monies due from said corporation to the plaintiff herein.

The property which has been foreclosed is more fully described in the annexed affidavit of appraisal. Said property is rented to the Morris Auto Supplies at a monthly rental of $75.00 a month. A small one car garage in the rear of these premises is also rented for $9.00 per month. In addition, the decedent's mother occupies a four room apartment in said premises. The total rental value of said premises is, therefore, in excess of $100.00 per month.

Said premises are assessed for New York City taxes in the sum of $15,000.00 for the total tax of about $417.00.

The plaintiff has bid in the property on the foreclosure sale at a price of $4,000.00, and your deponent respectfully submits that it is inequitable and unconscionable to permit the plaintiff to receive the premises in question at a price of $4,000.00 when the total rental value is in excess of $1,200.00 per year and is assessed for City tax purposes at $15,000.00.

There is a further reason why the plaintiff's action herein is inequitable and unconscionable. As above stated, the [fol. 34] source of the obligation arose upon a guarantee by the decedent, James J. Carpenter, of a corporation's obligation, which guarantee was signed in the year 1928. The plaintiff has its remedies against the corporation, and it also has its remedies, which it is exercising simultaneously herewith, against the other guarantor, George U. Hammond, individually. Your deponent, therefore, re-

spectfully submits that it would be inequitable and unconscionable to permit the plaintiff herein to take the property in question under the foreclosure without crediting the estate of James J. Carpenter with the real value of said premises and permitting plaintiff to keep the premises, dispose of the same, and secure a deficiency judgment of over $16,000.00.

(Sworn to January 20, 1939.)

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AFFIDAVIT OF DONALD J. LYONS, IN SUPPORT OF DEFENDANT'S CROSS-MOTION

BOROUGH OF BROOKLYN,
County of Kings, ss:

DONALD J. LYONS, being duly sworn, deposes and says:

That he is a duly licensed Real Estate Broker in and for the State of New York.

That he resides at 533 Nostrand Avenue in the Borough of Brooklyn, County of Kings, City and State of New York. [fol. 35] That he has been actively engaged in the Real Estate business for the past twenty-five years and maintains an office for the practice of such business at 531 Nostrand Avenue in the Borough of Brooklyn, County of Kings, City and State of New York.

That he is thoroughly familiar with Real Estate values in the Borough of Brooklyn, County of Kings, City and State of New York, having acted as Broker in many transactions involving the sale, rental and mortgaging of Real Estate, particularly in the vicinity of the corner of Fourth Avenue and Thirty-eighth Street in that Borough.

That on the eighteenth day of January, 1939, he personally visited the premises located on the northeast corner of Fourth Avenue and Thirty-eighth Street, in the Borough of Brooklyn, County of Kings, City and State of New York, finding them to be lot 1 in Block 700 of Section 3, a plot of land measuring 20.2 feet, front and rear, and 100 feet deep on each side, improved with: (1) a two story brick building measuring about 26 feet by 20 feet containing a store and dwelling quarters above for one family, (2) a one story concrete block building used as a shop or garage measuring about 51 feet by 20 feet and (3) a one story brick garage

measuring about 12 feet by 20 feet and that, on information furnished him, he believes the gross annual rent at present of these premises to be about $1,200.

That, in his opinion, the fair market value, as of the date of his examination, was five thousand ($5,000) dollars for the land and six thousand ($6,000) dollars for the buildings or a total of eleven ($11,000) thousand dollars.

(Sworn to January 19, 1939.)

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[fol. 36] CORRECTED AFFIDAVIT OF DONALD J. LYONS, IN SUPPORT OF DEFENDANT'S CROSS-MOTION

BOROUGH OF BROOKLYN,
County of Kings, ss:

DONALD J. LYONS, being duly sworn, deposes and says:

That he is a duly licensed Real Estate Broker in and for the State of New York.

That he resides at 533 Nostrand Avenue in the Borough of Brooklyn, County of Kings, City and State of New York.

That he has been actively engaged as a broker in the Real Estate business for the past twenty-five years and that he maintains an office for the practice of such business at 531 Nostrand Avenue in the Borough of Brooklyn, County of Kings, City and State of New York.

That he is thoroughly familiar with Real Estate values in the Borough of Brooklyn, County of Kings, City and State of New York, having acted as broker in many transactions involving the sale, rental and mortgaging of Real Estate, particularly in the vicinity of the corner of Fourth Avenue and Thirty-eighth Street of that Borough.

That on the eighteenth day of January, 1939, he personally visited the premises located on the northeast corner of Fourth Avenue and Thirty-eighth Street, in the Borough of Brooklyn, County of Kings, City and State of New York, finding them to be lot 1 in block 701 of Section 3, being known as by street number 975 Fourth Avenue, Brooklyn, New York, and being a plot of land measuring 25.2 feet, front and rear, and 100 feet deep on each side, improved [fol. 37] with: (1) a two story brick building measuring about 25 feet by 26 feet containing a store on the ground floor and dwelling quarters above for one family, (2) a one

story concrete block building used as a shop or garage measuring about 25 feet by 55 feet and (3) a one story brick garage measuring about 25 feet by 12 feet, and that, on information furnished him, he believes the gross annual rent at present of these premises to be about $1,200.

That, in the opinion of your deponent, the fair market value of the above described premises, as of the date of his examination, was Five thousand ($5,000) Dollars for the land and Six thousand ($6,000) Dollars for the buildings or a total of Eleven thousand ($11,000) Dollars.

(Sworn to January 20, 1939.)

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IN SUPREME COURT OF NEW YORK

AFFIDAVIT OF FRANKLYN M. STONE, IN OPPOSITION TO DEFENDANT'S CROSS-MOTION

City, County and State of New York, ss:

FRANKLYN M. STONE, being duly sworn, deposes and says, that he is associated with the attorneys for the plaintiff in this action and has charge of this case.

This affidavit is submitted in opposition to the cross-motion made by the defendant, Hammond, to fix the value of the premises involved in this action for the purpose of a deficiency judgment.

[fol. 38] A memorandum of law is being submitted to the court, in behalf of the plaintiff, in which the plaintiff contends that upon the authorities cited therein this court is without power to grant the relief requested in the cross-motion. Without prejudice to that position and solely because the cross-movant has submitted an affidavit of one Lyons in which he expresses the opinion that the premises in question are worth $11,000, there is hereto annexed an affidavit made by Harold M. Mills, a real estate appraiser, in which he has appraised the value of the premises at $6,500.

Upon the argument of this motion before Mr. Justice May on January 23, 1939, the court stated that if it had power to go into the question of the value of the premises, it would be inclined to give great weight to the City's assessment of $15,000 where there was a conflict of expert opinion as to value. In this connection, the court's attention is called

to the fact that even Mr. Lyons, who has made an affidavit in behalf of the cross-movant, is $4,000 under the City's assessment and that Mr. Lyons merely expresses his opinion as to value without giving any factual basis therefor. In the annexed affidavit of Mr. Mills, however, the gross rentals are set forth and the actual expenses are also set forth, and the valuation expressed by Mr. Mills is based thereon.

In these times, deponent submits that a valuation having relation to the income of the property is more likely to represent the real value of the premises than a valuation such as is made by Mr. Lyons without regard to those factors or an appraisal made by the City of New York for the purposes of taxation. Furthermore, as is pointed out in the memorandum of law submitted in behalf of plaintiff, it is [fol. 39] universally accepted that property sold at foreclosure sales will yield less than property sold at private sales between willing buyers and willing sellers. Even if the court were to find a theoretical valuation somewhere between that fixed by Mr. Mills and Mr. Lyons, the price at which this property sold could not be deemed so inadequate as to shock the conscience of the court under the circumstances.

Deponent therefore submits, both as a matter of law and as a matter of fact, that the cross-motion should be denied and that the plaintiff's motion should be granted.

(Sworn to January 24, 1939.)

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IN SUPREME COURT OF NEW YORK

AFFIDAVIT OF HAROLD M. MILLS, IN OPPOSITION TO DEFENDANT'S CROSS-MOTION

City, County and State of New York, ss:

HAROLD M. MILLS, being duly sworn, deposes and says:

For over nine years I have been employed by The National City Realty Corporation and have appraised a great variety of real property.

On January 23, 1939, I personally visited and inspected the property involved in this action which is located at the northeast corner of Fourth Avenue and 38th Street, Brook-

lyn, N. Y., for the purpose of appraising its value. The following facts enter into my appraisal.

The plot fronts 25′ 2″ on Fourth Avenue and has a depth of 100′. It is improved with three contiguous structures. [fol. 40] On the Fourth Avenue frontage there is a two story and cellar brick store and apartment building approximately 25′ 2″ in width by 27′ 6″ in depth. This building has a store on the ground floor and an apartment consisting of three rooms and bath on the second floor. There is a heating plant in the cellar which is not in use. To the rear of that building there is a one story cement block and frame garage type structure which is approximately 25′ 2″ in width and 58′ in length; and to the rear of the latter structure there is a one-story brick and frame one car garage which is approximately 14′ 6″ by 25′ 2″.

The store and the large garage structure to the rear rent for $75 per month. The small garage rents for $7 per month. Arrangements have just been made to rent the three room apartment for $10 per month. Hence, the gross rentals derived from the building are $1,104 per annum.

In appraising this property, however, I have estimated that it has a fair rental value, if fully rented, of $1,200 per annum. I have allowed only $100 per annum, less than 10%, for vacancies and loss of rent. This results in an estimated gross annual income of $1,100.

Expenses have been figured as follows:

| | |
|---|---|
| Taxes | $441 |
| Insurance | 50 |
| Water | 20 |
| Repairs, Supplies and Sundries | 100 |
| Salaries | — |
| Electricity | — |
| Fuel | — |
| | $611 |

[fol. 41] The annual net income is therefore estimated at approximately $500.

It is my opinion that for this property a capitalization rate of not less than 8% should be applied to the annual net income in determining its value. This would result in a valuation of $6,250.

After taking into consideration, among other things, the type of property, the location and immediate surroundings,

the present physical condition and occupancy, the transportation facilities, and the income and expenses, I have determined that the justifiable fair market value is $6,500.

I am aware that this property has been assessed for tax purposes at $15,000, but in my opinion this is an over assessment which cannot be justified upon any reasonable basis that comes to my mind. The real estate taxes paid, as a result of this high valuation, constitute 72% of the annual expenses and it is my opinion that said assessed value is an important factor in depressing the fair market value of this property to my estimate of $6,500.

The property is listed for sale with The National City Realty Corporation and can be purchased at the valuation which I have placed upon it.

(Sworn to January 24, 1939.)

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IN SUPREME COURT OF NEW YORK, KINGS COUNTY

OPINION OF MR. JUSTICE MAY

Nat. City Bank of N. Y. v. Gelfert—Motion to confirm referee's report, etc., granted. Cross motion to fix value denied. (N. Y. L. J., February 1, 1939.)

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[fol. 42] AFFIDAVIT OF NO OTHER OPINION

City, County and State of New York, ss:

CHARLES H. BUCKLEY, being duly sworn, deposes and says, that he is the attorney for the defendant-appellant herein, and is familiar with the facts and proceedings herein, that no opinion other than the foregoing opinion of Mr. Justice May was rendered by the Court below in making the order appealed from herein.

Charles H. Buckley.

Sworn to before me this 22nd day of April, 1939.
Lillian T. McManus, Notary Public, Kings County.

Kings Co. Clks. No. 37; Reg. No. 137.
N. Y. Co. Clks. No. 94; Reg. No. O-Mc-56.

Commission expires March 30, 1940.

[fols. 43-44] STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the papers as hereinbefore printed, consist of true and correct copies of the notice of appeal, the order appealed from, and all the papers upon which the court below acted in making the order appealed from, and the whole thereof, now on file in the office of the Clerk of Kings County.

Certification thereof, in pursuance of said Section 170 is hereby waived.

Dated, New York, April 24th, 1939.

McKercher & Link, Attorneys for Defendant-Appellant. Zalkin & Cohen, Attorneys for Plaintiff-Respondent.

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[fol. 45] IN SUPREME COURT OF NEW YORK, KINGS COUNTY

THE NATIONAL CITY BANK OF NEW YORK, Plaintiff,

against

JULIA C. GELFERT and GEORGE U. HAMMOND, as Executors under the Last Will and Testament of James J. Carpenter, Deceased; Marie V. Carpenter, Dorothy R. Carpenter, Vivian D. Carpenter, Morris Ances, Doing Business as Morris Auto Supplies, Mary Carpenter, Michaels Bros., Abraham & Straus, Inc., The People of the State of New York and The United States of America, Defendants

NOTICE OF APPEAL TO COURT OF APPEALS

SIRS:

Please take notice, that the above named plaintiff, The National City Bank of New York, hereby appeals to the Court of Appeals of the State of New York from so much of the judgment in the above entitled action, entered in the office of the Clerk of Kings County on the 1st day of September, 1939, which judgment was entered upon the order of the Appellate Division of the Supreme Court, Second Department, entered and filed in the office of the Clerk of said Appellate Division on July 7, 1939, and upon the remittitur filed on July 17, 1939 in the office of the Clerk of Kings

County, as modified the order entered herein on the 2nd day of February, 1939, by striking therefrom all of its directory provisions except the denial of the defendant's cross-motion and that part thereof which ratifies and confirms the [fol. 46] Referee's report of sale, omitting therefrom the reference to a deficiency judgment, and as vacated the judgment in the above entitled action entered pursuant to said order of February 2, 1939, in favor of the above named plaintiff against the defendants, Julia C. Gelfert and George U. Hammond, as Executors under the Last Will and Testament of James J. Carpenter, Deceased, and appeals as aforesaid from the said order of the Appellate Division entered on July 7, 1939.

Dated, New York, September 2nd, 1939.

Yours, &c., Zalkin & Cohen, Attorneys for Plaintiff, Office & P. O. Address, 19 Rector Street, Borough of Manhattan, City of New York.

To: Clerk of the County of Kings, County Courthouse, Brooklyn, New York. McKercher & Link, Esqs., Attorneys for Defendant, George U. Hammond, etc., 17 John Street, New York, N. Y.

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[fol. 47] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

THE NATIONAL CITY BANK OF NEW YORK, Respondent,

against

JULIA C. GELFERT, et al., Defendants; GEORGE U. HAMMOND, as Executor under the Last Will and Testament of James J. Carpenter, Deceased, Appellant

ORDER MODIFYING AND AFFIRMING, AS MODIFIED, THE ORDER APPEALED FROM AND VACATING THE JUDGMENT APPEALED FROM—July 7, 1939

The above named George U. Hammond, as Executor under the Last Will and Testament of James J. Carpenter, deceased, a defendant in this action having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court entered in the office of the Clerk of the County of Kings on the 2nd day of February, 1939, grant-[fol. 48] ing plaintiff's motion to confirm the referee's re-

port of sale, denying defendant's cross-motion to fix the real value of the premises foreclosed, and directing that a deficiency judgment be docketed, and from the judgment docketed pursuant to said order herein, and the said appeal having been argued by Mr. Charles H. Buckley of Counsel for the appellant, and argued by Mr. B. B. Fensterstock of Counsel for the respondent, and due deliberation having been had thereon,

It is Ordered that the order so appealed from be and the same hereby is modified by striking therefrom all of its directory provisions except the denial of the defendant's cross-motion and that part thereof which ratifies and confirms the referee's report of sale, omitting therefrom however, the reference to a deficiency, and as so modified unanimously affirmed, without costs, and it is

Further Ordered that the judgment entered pursuant to said order be and the same hereby is vacated.

Enter.

E. L., P. J.

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[fol. 49] JUDGMENT ENTERED ON ORDER OF APPELLATE DIVISION

No. 11240

| Against Whom Obtained | In Whose Favor |
|---|---|
| Julia C. Gelfert<br>825 E. 13 St.,<br>George U. Hammond<br>129 Pearl St., N. Y. C.<br>as Executors of the Estate of<br>James J. Carpenter | National City Bank of New York<br>55 Wall St., N. Y. C. |

| Where Perfected | When Perfected | H. M. | Amount Damages and Costs | Attorney | When |
|---|---|---|---|---|---|
| Supreme Court<br>Kings County | Feb. 4<br>1939 | 10:20 | Def.<br>16,162.12<br>& Int. from<br>12/22/38 | Zalkin<br>&<br>Cohen | Judgment vacated,<br>see Order & Remit.<br>Filed Sep. 1, 1939. |

County Clerk's Office,
County of Kings, ss:

I, John N. Harman, Clerk of the County of Kings, certify that the above is a true and correct transcript from the Docket of Judgments kept in my office, and I also certify that the above Judgment is Vacated as above stated.

In Testimony Whereof, I have hereunto set my name and affixed my official seal this day of Oct. 4, 1939.

John N. Harman, Clerk. (Seal.)

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[fol. 50] In New York Supreme Court, Appellate Division, Second Department

Lazansky, P. J.; Hagarty, Johnston, Adel and Close, JJ.

The National City Bank of New York, Respondent,

against

Julia C. Gelfert, et al., Defendants; George U. Hammond, as Executor under the Last Will and Testament of James J. Carpenter, Defendant-Appellant

Appeal by George U. Hammond, as one of the Executors, etc., from an order entered in the office of the Clerk of the County of Kings on the 2nd day of February, 1939, confirming the referee's report of sale, denying appellant's cross-motion for an order fixing the value of the premises foreclosed and directing that a deficiency judgment be docketed; and from the judgment entered in said Clerk's office on the 4th day of February, 1939, pursuant to said order.

Charles H. Buckley (George Link, Jr., with him on the brief), for the Appellant.

Barney B. Fensterstock (Israel Akselrod and Theodore B. Wolf with him on the brief), for the Respondent.

Opinion

Per Curiam:

Appeal from order and judgment in a foreclosure action. [fol. 51] Order modified by striking therefrom all of its directory provisions and by providing in lieu thereof that

plaintiff's motion be granted to the extent of confirming the referee's report of sale except as to deficiency and otherwise denied, and that the cross-motion of the defendant-executor be denied, and, as so modified, the order is unanimously affirmed, without costs. Judgment entered pursuant to said order vacated. Plaintiff did not make an application for a deficiency judgment, as provided by Section 1083 of the Civil Practice Act. Said defendant's cross-motion for an order fixing the value of the premises in order to determine the amount of deficiency, if any, was properly denied, because by it said defendant really sought a modification of the judgment of foreclosure and sale. Lazansky, P. J., Johnston and Adel, JJ., concur. Hagarty, J., concurs in result, with opinion. Close, J., concurs with Hagarty, J.

HAGARTY, J. (concurring):

I concur in result.

In accordance with a judgment of foreclosure and sale of mortgaged premises situate in the County of Kings, adjudicating that there was due to plaintiff the sum of $18,401.25, the property was sold to the plaintiff on the 16th day of December, 1938, for the sum of $4,000, leaving a deficiency, after inclusion of interest and expenses, of $16,162.12. In opposition to a motion to confirm the referee's report of sale and for a deficiency judgment, and by way of cross-motion, the appellant sought an order fixing the value of the premises so foreclosed "for the purposes of deficiency judgment proceedings", upon the general ground that it would be inequitable and unconscionable to permit plaintiff to have a deficiency judgment other than [fol. 52] one measured by the value of the premises. Were it not for the application of Section 1083 of the Civil Practice Act, as amended in 1938 (Laws of 1938, Chap. 510 in effect April 7, 1938), which appellant invokes on this appeal, an affirmance of the order under review would be required under the recent rulings by the Court of Appeals. Prior to the enactment of this amendment, the right to a deficiency judgment was the creation of statute (New York Life Ins. Co. v. Guttag Corp., 265 N. Y. 292, 296), pursuant to which a deficiency judgment followed as an incident to the final judgment of foreclosure and sale (Feiber Realty Corp. v. Abel, 265 N. Y. 94), and a court of equity was without power to withhold such deficiency judgment (Emi-

grant Industrial Sav. Bank v. Van Bokkelen, 269 N. Y. 110) or to vacate the final judgment of foreclosure and sale on a showing that inequity or hardship, resulting from general economic conditions, would follow the entry of such deficiency judgment. (Guaranteed Title & Mort. Co. v. Scheffres, 275 N. Y. 30, overruling Monaghan v. May, 242 App. Div. 64, and Guaranteed Title & Mortgage Co. v. Scheffres, 247 App. Div. 294.)

The facts here presented did not warrant the setting aside of the sale on the ground that the price obtained was shockingly inadequate. (See Emigrant Industrial Sav. Bank v. Van Bokkelen, supra, p. 115; Housman v. Wright, 50 App. Div. 606.) Though plaintiff purchased the property for the sum of $4,000, plaintiff's real estate expert appraised it at the sum of $6,500, at which price plaintiff now offers the property for sale. Although claiming its value to be much greater, appellant offers no specific hope that substantially more than $4,000 would be obtained on a resale.

[fol. 53] Section 1083 of the Civil Practice Act, as amended, requires one seeking a deficiency judgment after foreclosure and sale to make application therefor within a specified time, and limits the amount of such judgment in accordance with a determination of the market value of the property. Thus, in effect, the standard to be applied in determining the amount of deficiency judgments which was set up in the emergency legislation (§ 1083-a, Civ. Prac. Act) has been permanently adopted.

It is conceded that the mortgage here involved, made on the 29th day of December, 1932, is not within the purview of Section 1083-a, Civil Practice Act. It is apparent, however, that Section 1083, as amended, is applicable, inasmuch as that statute relates to "all cases where the sale is held after the date this section as hereby amended takes effect".

Respondent contends that the amended section, in so far as it purports to affect the right to a deficiency judgment for the whole of the residue, is unconstitutional as violative of the due process clause of the Constitution of this State.

The constitutionality of the emergency legislation, of which this amendment is a counterpart, namely, Section 1083-a, Civil Practice Act, has been upheld, although not without indication that the determination was predicated upon the principle that its constitutionality was dependent upon the exercise of police power to cope with an emergency, Klinke v. Samuels, 264 N. Y. 144; New York Life

Ins. Co. v. Guttag Corp., 265 N. Y. 292. That ground was not invoked, however, by the United States Supreme Court in holding that the emergency statute was not violative of the contract clause of the Federal Constitution. In Honey- [fol. 54] man v. Jacobs (— U. S. —, decided April 17, 1939), Chief Justice Hughes writes:

"The contract contemplated that the mortgagee should make himself whole, if necessary, out of the security but not that he should be enriched at the expense of the debtor or realize more than what would repay the debt with the costs and expenses of the suit. Having a total debt of $15,771.17, with expenses, etc., of $1319.03, appellant has obtained through his foreclosure suit the property of the debtor found without question to be worth over $25,000. He has that in hand. We know of no principle which entitles him to receive anything more. Assuming that the statute before its amendment permitted a recovery of an additional amount through a so-called deficiency judgment, we cannot say that there was any constitutional sanction for such a provision which precluded the legislature from changing it so as to confine the creditor to securing the satisfaction of his entire debt. Section 1083-a in substance assured to the court the exercise of its appropriate equitable powers. By the normal exercise of these powers, a court of equity in a foreclosure suit would have full authority to fix the terms and time of the foreclosure sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or the price bid was inadequate. Home Building & Loan Association v. Blaisdell, supra (290 U. S. 398), at pp. 446, 447, and cased cited, note 13. Richmond Mortgage Corpo- [fol. 55] ration v. Wachovia Bank, supra (300 U. S. 124), at p. 129. In this control over the foreclosure sale under its decree, the court could consider and determine the value of the property sold to the mortgagee and what the mortgagee would thus realize upon the mortgage debt if the sale were confirmed. See Monaghan v. May, 242 App. Div. N. Y. 64, 67; Guaranteed Title & Mortgage Co. v. Scheffres, 247 App. Div. N. Y. 294."

In discussing a statute of North Carolina considered by the United States Supreme Court in Richmond Corp. v. Wachovia Bank (300 U. S. 124), the Chief Justice further writes:

"The act recognized the obligation of his contract and his right to its full enforcement but limited that right 'so as to prevent his obtaining more than his due. By the old and well known remedy of foreclosure, a mortgagee was so limited because of the chancellor's control of the proceeding'. That 'classical method' of realization upon a mortgage security through a foreclosure suit had always been understood 'to be fair to both parties to the contract and to afford an adequate remedy to the mortgagee'. In that view it appeared that the new law as to proceedings for a deficiency judgment after the exercise of a power of sale 'merely restricted the exercise of the contractual remedy to provide a procedure which, to some extent, renders the remedy by a trustee's sale consistent with that in equity'."

[fol. 56] Although this reasoning would apply as forcefully to Section 1083 as amended, we are concerned, of course, with the question of the constitutionality of that statute in the light of our State Constitution.

As this mortgage was made prior to the enactment of the amended section, respondent invokes the doctrine that laws in effect at the time and place of the making of the contract enter into and form part of the contract as fully as if they had been expressly referred to or incorporated in its terms. (Farmers Bank v. Fed. Reserve Bank, 262 U. S. 649, 650.) On the other hand, appellant points to the equally well founded principle that, at the time of the making of a contract, the parties thereto are chargeable with knowledge of the existence of the power of the State to modify remedies for enforcement of contract obligations. (Preston Co. v. Funkhouser, 261 N. Y. 140, affd. 290 U. S. 163, 168.) It is, therefore, competent for a state to change the form of a remedy provided no substantial right secured by contract is thereby impaired. (Home Bldg. & L. Assn. v. Blaisdell, 290 U. S. 398, 430.) "In all such cases the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge." (Antoni v. Greenhow, 107 U. S. 769, 773.)

The respondent presents an impressive argument in support of its contention that the amended section works a substantial deprivation of its theretofore existing right to a deficiency judgment, based simply upon arithmetical computation of the difference between the amount due and that realized upon the sale. In addition, at the time of the mak-

ing of the mortgage there was no obligation, express or [fol. 57] implied, imposed upon the mortgagee to bid in the pledged property upon foreclosure. With a deficiency judgment dependent upon market value, however, the mortgagee must reconcile himself to payment in land rather than in money, if he forecloses his lien. He must bid in the property at its market value or suffer the loss of a deficiency judgment for the difference between such value and the amount bid by another.

While due appreciation must be accorded the forcefulness of the above and kindred contentions with respect to the substance of rights of which a mortgagee is deprived by virtue of the amended section, it must be borne in mind that dual remedies are afforded a creditor whose indebtedness is secured by mortgage. He may sue for the debt in personam, irrespective of the pledge, and procure a money judgment in entirety, or he may foreclose his lien. In invoking the latter remedy he brings himself within the jurisdiction of equity which, in the exercise of its inherent power, would grant a deficiency judgment only if satisfied that the circumstances warranted such award in accordance with the dictates of fairness and justice, which would exclude a mortgagee who had obtained real property of a value equivalent to the indebtedness. (Honeyman v. Jacobs, supra; Home Bldg. & L. Assn. v. Blaisdell, supra, pp. 446, 447; Monaghan v. May, 242 App. Div. 34; Guaranteed Title & Mortgage Co. v. Scheffres, 247 App. Div. 294; Federal Title &c. Guaranty Co. v. Lowenstein, 113 N. J. Eq. 200.) But in this State, that natural and ancient attribute of chancery was superseded by statute awarding deficiency judgment as a matter of course. (Feibar Realty Corp. v. Abel, supra; Emigrant Industrial Sav. Bank v. Van Bokkelan, supra; Guaranteed Title & Mortgage Co. v. Scheffres, [fol. 58] supra.) The effect of the amended section is to dispense with that requirement, to a prescribed extent, and to recognize in equity a power normally exercised by that court. Of such inherent power a mortgagee must be deemed to have been aware at the time of entering into his contract. It was within the power of the Legislature, in my opinion, to set up market value of property as the basis upon which deficiency judgments should be granted, and that thereby there was no impairment of any substantial right in the mortgagee. Such legislation safeguards the indebtedness of the mortgagee by providing for real property and a

money judgment in a combined value equivalent thereto, although it has the effect of stimulating the mortgagee into activity in according justice to the mortgagor as well as to himself. The amended section, as affecting the remedy of the respondent, is constitutional.

Although in its cross-motion the appellant did not invoke the amended section, the fact remains that respondent made no application for a deficiency judgment in accordance with the provisions of the section. On the contrary, and in support of its motion as made for judgment as a matter of course, the respondent's affidavit avers that the amended section is inapplicable. Thus there has never been an application by respondent, in accordance with law, for the deficiency judgment which it seeks.

Close, J., concurs.

[fol. 59] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 60] IN COURT OF APPEALS OF NEW YORK

Pleas in the Court of Appeals held at Court of Appeals Hall in the City of Albany, on 8th day of October in the year of our Lord one thousand nine hundred and forty before the Judges of said Court:

Witness,
The Hon. Irving Lehman, Chief Judge, Presiding.
John Ludden, Clerk.

REMITTITUR—October 9, 1940

THE NATIONAL CITY BANK OF NEW YORK, Appellant,

ag'st

KULIA C. GEOFERT, as exrs. etc. & ors. Impl'd with GEORGE U. HAMMOND, as Exr. etc. of James J. Carpenter, Dec'd., Respondent

Be It Remembered, That on the 16th day of February in the year of our Lord one thousand nine hundred and forty The National City Bank of New York the appellant in this cause, came here unto the Court of Appeals by Zalkin & Cohen, its attorneys, and filed in the said Court a Notice of

Appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And George U. Hammond as executor etc. of James J. Carpenter the respondent in said cause, afterwards appeared in said Court of Appeals by McKercher & Link, his attorneys.

Which said Notice of Appeals and the return thereto filed as aforesaid are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. B. B. Fensterstock of counsel for the appellant and submitted by counsel for the respondent, and [fol. 61] after due deliberation had thereon did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and that of Special Term affirmed and its judgment reinstated without costs,

And it was also further ordered that the records aforesaid, and the proceedings in this court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order of the Appellate Division be reversed and that of Special Term affirmed and its judgment reinstated without costs, as aforesaid,

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the justices thereof, according to the form of the statute in such cases made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the justices thereof, etc.

John Ludden, Clerk of the Court of Appeals of the State of New York.

[fol. 62] In Supreme Court of New York, Kings County
(Special Term—Part II)

6996/1938

The National City Bank of New York, Plaintiff,

against

Julia C. Gelfert and George U. Hammond, as Executors under the Last Will and Testament of James J. Carpenter, Deceased, Marie V. Carpenter, Dorothy R. Carpenter, Vivian D. Carpenter, Morris Ances, Doing Business as Morris Auto Supplies, Mary Carpenter, Michaels Bros., Abraham & Straus, Inc., the People of the State of New York and the United States of America, Defendants

Order on Remittitur—November 1, 1940

The above-named plaintiff appealed to the Court of Appeals of the State of New York from an order of the Appellate Division of the Supreme Court, Second Department, modifying an order of Special Term, Part II of the Supreme Court of the State of New York, County of Kings, dated February 2, 1939, which order granted plaintiff's motion to confirm report of the referee to sell and directed the entry of a deficiency judgment in the sum of $16,162.12 against the defendants Julia C. Gelfert and George U. Hammond, as executors under the Last Will and Testament of James J. Carpenter, Deceased, upon which order judgment in the sum of $16,162.12 was entered in the office of the Clerk of the County of Kings on February 4, 1939, and from each and every part of said order, as well as from the whole thereof; and the said appeal having been duly argued at [fol. 63] the said Court of Appeals, and, after due deliberation, the Court of Appeals having ordered and adjudged that the order of the Appellate Division of the Supreme Court, Second Department, appealed from as aforesaid, be reversed and that of the Special Term affirmed and its judgment reinstated without costs and having ordered and adjudged that the proceedings therein be remitted to this Supreme Court, there to be proceeded upon according to law,

Now, on reading and filing the remittitur from the said Court of Appeals herein, and upon motion of Zalkin & Cohen, attorneys for the plaintiff herein, it is hereby

Ordered that the order and judgment of the said Court of Appeals be and the same hereby is made the order and judgment of this court;

Enter,

J. T. H., J. S. C.

Granted Nov. 1, 1940. Francis J. Sinnott.

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[fol. 64]

IN SUPREME COURT OF NEW YORK, KINGS COUNTY

[Title omitted]

ORDER AMENDING TITLE OF ACTION—December 23, 1940

Julia C. Gelfert as the sole surviving Executor of the Last Will and Testament of James J. Carpenter, deceased, having moved this Court for an order to properly reflect the death of George U. Hammond, one of the Executors of said Estate; and on reading the final notice of motion dated November 29, 1940, the affidavit of Julia C. Gelfert sworn to the 28th day of November, 1940, together with proof of due service thereof and on all the proceedings heretofore had herein in support of said motion; and the affidavit of Barney B. Fensterstock sworn to December 4, 1940 in opposition thereto; McKercher & Link by Charles H. Buckley of Counsel appearing in support of said motion and Zalkin & Cohen by Barney B. Fensterstock, Esq. of Counsel in opposition thereto; and due deliberation having been had thereon.

Now, upon motion of McKercher & Link, attorneys for [fol. 65] said Julia C. Gelfert as such sole surviving Executor, it is

Ordered that said motion be and the same hereby is granted to the extent of amending the title of this action and the proceedings herein to read as follows:

"Supreme Court, Kings County

The National City Bank of New York, Plaintiff,

against

Julia C. Gelfert as sole surviving Executor of the Last Will and Testament of James J. Carpenter, deceased, Vivian D. Carpenter, Marie V. Carpenter, Dorothy R. Carpenter, Morris Ances, Doing Business as Morris Auto Supplies, Mary Carpenter, Michaels Bros., Agraham & Straus, Inc., the People of the State of New York and the United States of America, Defendants."

Enter.

Cuff, J. S. C.

Granted Dec. 23, 1940. Francis J. Sinnott, Clerk.

Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 66] Supreme Court of the United States

[Title omitted]

Order Extending Time within which to File Petition for Certiorari

Upon Consideration of the application of counsel for the Petitioner,

It Is Ordered that the time within which to file petition for certiorari in the above entitled cause be, and the same hereby is, extended to, and including, February 7, 1941.

Harlan F. Stone, Associate Justice of the Supreme Court of the United States.

Dated this 3rd day of January, 1941.

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[fol. 67] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 3, 1941

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3363)